Supreme Court, U.S.
FILED
APR 22 2002
OFFICE OF THE CLERK

NO. 01-1212

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILWAY CO.,
Petitioner,

v.

TAMARA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari
to the Indiana Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH J. ALLEN
(*Counsel of Record*)
JAMES E. BRAMMER
KENNETH J. ALLEN & ASSOCIATES
Allen Law Building
1109 Glendale Boulevard
Valparaiso, IN 46383
(219) 465-6292

Counsel for Respondents

April 22, 2002

QUESTION PRESENTED

In this case, a jury found the defendant railroad liable for damages on the ground that its negligence caused a grade-crossing collision in which the plaintiff's husband died. The question presented is:

> Should this Court grant review to decide whether, in an unpublished ruling, the Indiana Court of Appeals erred in holding that plaintiff's state law claim is not preempted by the Federal Railroad Safety Act where, at the time of the accident:
>
> (1) a grade-crossing improvement project that included flashing lights and gates had been approved by the Federal Highway Administration but the lights and gates were not yet "installed and operating," *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344, 354 (2000); and
>
> (2) federal funds had been "committed" to the project, but there is no evidence that any federal funds had actually been spent.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. The Decision Below is Consistent with *Shanklin* and *Easterwood*. 2

II. Contrary to Petitioner's Assertion, the Decision Below Does Not Conflict with Decisions of the Tenth Circuit. 8

CONCLUSION 10

TABLE OF AUTHORITIES

PAGES(S)

CASES

Akin v. Missouri Pacific R.R.,
977 P.2d 1040 (Okla. 1998) 6, 7,

Armijo v. Atchison, Topeka & Santa Fe Railway,
87 F.3d 1188 (10th Cir. 1996) 8, 9

CSX Transportation v. Easterwood,
507 U.S. 658 (1993) 2, 3, 5, 6, 7

Hatfield v. Burlington N. R.R.,
64 F.3d 559 (10th Cir. 1995) 9

Norfolk Southern Railway v. Shanklin,
529 U.S. 344 (2000) 2, 3, 4, 5, 6, 8, 9

Shots v. CSX Transport, Inc.,
38 F.3d 304 (7th Cir. 1994) 9

St. Louis Southwestern Railway v. Malone Freight Lines,
39 F.3d 864 (8th Cir. 1994) 6

Thiele v. Norfolk & Western Ry,
68 F.3d 179 (7th Cir. 1995) 6

REGULATION

29 C.F.R. § 646.216(e)(2)(iv) 7

RULE

S. Ct. Rule 10(b) 8

STATEMENT OF THE CASE

On November 6, 1988, one of petitioner's trains collided with a car driven by Ruldolph J. Kapitan at the Hendricks Street crossing in Merrillville, Indiana. Mr. Kapitan died as a result. Barely two months before the accident occurred, on August 1, 1988, the Federal Highway Administration (FHWA) had approved an upgrade project at the Hendricks Street crossing that was required to include both additional signs and automatic gates and flashers. At the time of the accident, the gates and flashers had not yet been installed.

Respondent Tamara Lee Kapitan, special administratrix of the estate of Rudolph Kapitan, filed suit in 1989 alleging that the railroad was negligent because it failed, among other things, to provide adequate warning devices at the crossing, including flashing lights and gates. The trial court granted summary judgment to petitioner, finding that Kapitan's inadequate-warning claim was preempted by the Federal Railroad Safety Act (FRSA) as of August 1988 when the upgrade project was approved by the FHWA.

Kapitan took an interlocutory appeal and the Indiana Court of Appeals reversed. In its unpublished 1997 opinion, the court held that respondent's claim was not preempted because the FHWA-approved devices were not actually installed and operating at the time of the accident.

In February 2000, a jury returned a verdict in favor of Kapitan. The jury determined that the railroad was fifty percent at fault. Total damages of $5,109,080 therefore resulted in a verdict of $2,554,740 for Kapitan. In another unpublished opinion, the court of appeals affirmed, again rejecting petitioner's preemption defense. The Indiana Supreme Court denied review.

REASONS FOR DENYING THE WRIT

Petitioner asserts that review should be granted on the ground that the decision below is inconsistent with this Court's precedent and because the decision below creates a conflict with the Tenth Circuit. Neither assertion is correct.

I. The Decision Below is Consistent with *Shanklin* and *Easterwood.*

In an attempt to create a conflict between the Indiana Court of Appeals and this Court's holdings in *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000), petitioner distorts the facts and the holding below. Petitioner implies that the crossing upgrade should be seen as two distinct projects, one for passive devices and another for active devices, the former having been installed and, petitioner claims, federally funded at the time of the accident. There are two problems with this view. First, the Hendricks Street crossing upgrade was approved by the FHWA as a single project that included signs as well as flashing lights and gates. Second, there is no evidence that *either* the signs or the lights and gates were paid for with federal funds until after the accident.

The trial court did not find "*as an uncontested fact that federal funds had participated in the installation of the stop signs and pavement markings at the Hendricks Street crossing.*" Pet. 11 (emphasis in original). What the trial court actually found, in its now-reversed order granting summary judgment to petitioner, is that the FHWA had approved the Hendricks Street crossing, thereby "*obligating* federal funds to pay for the project." C.A. App. 214-15 (emphasis added). Petitioner simply equates the finding that federal funds were "obligated"

for the project, or "committed" to the project, Pet.App. 8, with federal funds having "participated" in the project. But petitioner never explains how the funds "committed" or "obligated" are different from the "earmarked" funds in *Easterwood* 507 U.S. at 673, which had been "set aside," *id.* at 671, such that funds here participated in federal funding while the funds in *Easterwood* did not so participate. *Id.* at 672. Although federal funds may have been "obligated" or "committed" to the project, the federal funds were not actually disbursed until after the accident. In fact, the trial court included, among the very same list of uncontested facts from which petitioner draws support for its position, that "the project was completed and payments made *after* the collision occurred." C.A. App. 215 (emphasis added).

The court of appeals' holding that FHWA approval but nothing more is not sufficient to trigger preemption is not only consistent with *Easterwood*, it is compelled by that case. In *Easterwood*, as here, a project had been approved, and funds were "earmarked" for a crossing gate. 507 U.S. at 673. Of course, the project in *Easterwood* was abandoned, *id.* at 672, while the Hendricks Street project was eventually completed after the accident took place, but the ultimate completion makes no difference as to whether federal law preempted state law *at the time of the accident*; in both cases, the planned-for, federally-funded devices were not yet in place.

Petitioner complains that the Indiana Court of Appeals has not followed *Shanklin* and "simply ignored the fact that there were federally funded (and fully installed) warning devices at the crossing at the time of the accident." Pet. 11. This characterization overlooks two crucial differences between this case and *Shanklin*. First, in *Shanklin*, the plaintiff unsuccessfully argued that active devices were mandated by

federal law even though the FHWA had approved a project involving warning signs and crossbucks, which were in place at the time of the accident. The Court held that "[once] the FHWA approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced [State] statutory and common law addressing the same subject." 529 U.S. at 359. Here, by contrast, the FHWA approved a grade crossing project at Hendricks Street that included flashing lights and gates, and the railroad seeks to escape liability even though those devices were not installed at the time of the accident and federal funds had not yet been spent.

The second difference between this case and *Shanklin* is that, although petitioner asserts the passive warning devices that were in place at the Hendricks Street crossing at the time of the accident were "federally funded," that is not in the record. Here, funds were "committed" for the project, Pet. App. 8, but there is no evidence that federal funds had yet been actually expended at the time of the accident. Indeed, as noted above, the trial court found that payment for the project occurred after the accident. C.A. App. 215. Petitioner did not challenge this finding before the court of appeals. It argued that the signs and pavement markings in place at the time of the accident "were installed with federal funds and as part of a FHWA-approved project." Brief of Appellant in *Grand Trunk Western Railway Company v. Kapitan*, at 34-35, No. 37A03-0004-CV-140 (Ind. Ct. App. Aug. 11, 2000). Petitioner did not argue that federal funds were actually spent before Kapitan's accident. By contrast, in *Shanklin*, the state department of transportation had installed the required signs in 1987 with federal funds, and the accident occurred in 1993. 529 U.S. at 350.

Petitioner concedes that the Indiana Court of Appeals "did cite language" from *Shanklin* to the effect that preemption

of state-law remedies occurs only after the federally-approved and funded devices are installed and operating. Pet. 20. Indeed, the court below pointed to the following language in *Shanklin*:

> [O]nce the FHWA has funded the crossing improvement *and the warning devices are actually installed and operating*, the regulation "displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained."

Pet. App. 9a (quoting *Shanklin*, 529 U.S. at 354 (quoting *Easterwood*, 507 U.S. at 670)).

Petitioner dismisses the conclusion of the court below by trying to distinguish *Shanklin*:

> *Shanklin* cannot be read to have reached out to resolve an issue and a circuit conflict that were not presented and were not briefed: namely, the application of FRSA pre-emption to mid-project collisions. The passive devices at issue in *Shanklin* had been fully 'installed' and 'operating' long prior to the accident. Pet. 20.[1]

Although *Shanklin* did not involve a mid-project collision, the premise that completed installation is necessary to trigger preemption appears throughout this Court's opinion. *E.g.*, 529 U.S. at 357 ("When the FHWA approves a crossing

---

[1]The concession that *Shanklin* did not resolve the mid-project collision issue belies petitioner's assertion that the decision below is so unmistakably incorrect as to support summary reversal.

improvement project and the State *installs* the warning devices using federal funds, [that] displaces state tort law addressing the same subject.") (emphasis added); *id. at* 353 ("The sole question in this case ... is whether §§ 646.214(b)(3) and (4) 'are applicable' to all warning devices *actually installed* with federal funds." (emphasis added)); *id.* at 356 (referring to "devices *installed* under a so-called 'priority' or 'hazard' program") (emphasis added). The same premise appears in *Easterwood.* 507 U.S. at 672 ("These facts do not establish that federal funds 'participated in the installation of the [warning] devices' ... The only equipment *installed* was the motion-detection circuitry.").

Petitioner asserts that preemption logically occurs at "the beginning, rather than the end" of a FHWA-approved project and that "[i]t simply makes no sense to hold, in a project governed by federal pre-emption law that sets the standard for the *selection* of warning devices, that pre-emption of state law regarding the *selection* of warning devices does not occur until after the devices are actually 'installed and operating.'" Pet. 19. To the contrary, it makes perfect sense that preemption would not occur until the approved devices are installed and operating, since the public derives the protection of these devices only when they are actually in place. Under petitioner's rule, by contrast, "the public would be unprotected by either state or federal law for the period between federal approval and actual warning device installation." *Thiele v. Norfolk & Western Ry*, 68 F.3d 179,184 (7th Cir. 1995); *see also St. Louis Southwestern Ry. v. Malone Freight Lines*, 39 F.3d 864, 867 (8th Cir. 1994) ("To encourage prompt installation of federally prescribed warning devices, a railroad's common-law duty of care must continue until those devices are installed"); *Akin v. Missouri Pac. R.R.*, 977 P.2d 1040, 1053 (Okla. 1998) ("We do not believe that Congress intended for a no man's land to exist at grade crossings ... during which the public is protected

neither by the federally *mandated or* approved warning devices nor by judicial recourse for injuries sustained by their absence.") (emphasis in original).

Petitioner also argues that a regulation concerning the content of construction contracts, 29 C.F.R. § 646.216(e)(2)(iv), and a related reference in the FHWA's *Manual on Uniform Traffic Control Devices*, demands preemption of respondent's state-law claim after commencement of a project but before the planned crossing protection is installed and operating. Pet. 21-22. Petitioner's argument misses the mark. First of all, *Easterwood* specifically held that the *Manual* does not have preemptive effect. 507 U.S. at 669. Moreover, section 646.216(e)(2)(iv) does not, as petitioner asserts, deal with interim protection nor does it purport to place the federal government in exclusive control over project completion. Indeed, the regulation refers neither to safety nor to devices, but states only that protective "services" — referring to *labor* employed on federally-funded projects — must be included in the contract specifications between the railroad and the State. The regulation does not concern the point at which federal preemption is triggered and, not surprisingly, no federal case (including the Tenth Circuit cases upon which petitioner relies) so much as mentions the regulation. In any event, because, as noted above, the record contains *no* evidence that *any* federal funds were actually expended at the Hendricks Street crossing prior to the crash that killed Rudy Kapitan, the question whether the regulation may have preemptive effect is irrelevant to this case.

II. Contrary to Petitioner's Assertion, the Decision Below Does Not Conflict with Decisions of the Tenth Circuit.

Petitioner manufactures a non-existent split between the unpublished opinion below and the Tenth Circuit. The asserted conflict is based on a decision in which, prior to *Shanklin,* the Tenth Circuit took the view that state-law inadequate-warning claims are preempted by the FRSA at the point where there is an "actual expenditure of federal resources of more than a casual or de minimis nature" on the installation of a warning device. *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1190 (10th Cir. 1996). Even ignoring that the Indiana Court of Appeals is not a state court of last resort, *see* S. Ct. Rule 10(b), this supposed conflict provides no basis for review. First, the Tenth Circuit decision pre-dates *Shanklin.* Respondent is not aware of, and petitioner does not cite, any decision from the Tenth Circuit, or any other court, that post-dates *Shanklin* and is consistent with petitioner's reading of *Armijo.* This is important because, as noted above, *Shanklin* contemplates that preemption is not triggered until "the FHWA has funded the crossing improvement and the warning devices are actually installed and operating." 529 U.S. at 354. The Tenth Circuit will surely have the opportunity to re-consider its position in light of *Shanklin.* In the meantime, there is no reason to grant review.

Petitioner attempts to evade *Armijo's* pre-*Shanklin* pedigree by suggesting that *Armijo* was endorsed by this Court. *Armijo* was among the cases cited by *Shanklin* as presenting the conflict resolved in that case. *See* 529 U.S. at 351-52. Petitioner asserts that, because this Court "adopted the Tenth Circuit approach to the issue of whether passive devices could trigger pre-emption," *Shanklin* "left *Armijo* good law." Pet. 21

n.13. But the conflict described in the relevant citation, and resolved by *Shanklin,* had nothing to do with the question presented in the petition here. The conflict addressed in *Shanklin* was between courts holding that "federal funding of crossing improvement triggers pre-emption under FRSA" (such as the Tenth Circuit in *Armijo),* and courts holding that preemption does not occur until a representative of the federal government determines that the particular devices installed are adequate for safety (such as the Seventh Circuit in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994)). *Shanklin*, 529 U.S. at 352. Of course, *Armijo* remains good law insofar as it consistent with *Shanklin*, but that does not mean that *Armijo* overrides *Shanklin*'s clear and repeated statements that preemption cannot occur absent full installation and operation.

In any event, *Armijo* does not conflict with the decision below. In *Armijo*, unlike here, the Secretary of Transportation had approved a project for crossbucks, without active devices, and the Tenth Circuit construed FHWA approval to mean that the passive devices were adequate. 87 F.3d at 1190-91. In other words, *Armijo* presented a *Shanklin*-type situation and had nothing to do with mid-project accidents. Thus, there is no post-*Shanklin* conflict.[2]

* * *

To sum up: The decision below is entirely consistent with this Court's precedents. The federal government recognized that to provide safety at the Hendricks Street

---

[2]Petitioner also relies on *Hatfield v. Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995), but that decision also predates *Shanklin.*

crossing both signs and flashing lights and gates were needed, and it approved an upgrade project requiring both. Tragically, this project was not completed until after the crash that took Rudy Kapitan's life. Petitioner wants to escape liability even though, at the time of the accident, the lights and gates had not been installed as called for by the FHWA-approved plan. Petitioner would thus have this Court construe the FRSA so that the public is protected by neither the devices the FHWA deemed appropriate for a crossing nor by state common law, no matter how long an upgrade project takes to complete. In any event, petitioner never proved that federal funds had actually been spent on that part of the upgrade project in place at the time of the accident, making the alleged conflict with pre-*Shanklin* cases from the Tenth Circuit illusory at best.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Kenneth J. Allen
(Counsel of Record)
James E. Brammer
Kenneth J. Allen & Associates
Allen Law Building
1109 Glendale Boulevard
Valparaiso, IN 46383
(219) 465-6292

Counsel for Respondent

April 22, 2002